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2 UNITED STATES DISTRICT COURT  
3 DISTRICT OF MASSACHUSETTS

4  
5 IN RE: NEW ENGLAND COMPOUNDING ) MDL NO. 13-02419-RWZ  
6 PHARMACY CASES LITIGATION )  
7 )  
8 )

9 BEFORE: THE HONORABLE RYA W. ZOBEL AND  
10 THE HONORABLE JENNIFER C. BOAL  
11

12  
13 **STATUS CONFERENCE**  
14 **AND**  
15 **MOTION HEARING**  
16

17 John Joseph Moakley United States Courthouse  
18 Courtroom No. 12  
19 One Courthouse Way  
20 Boston, MA 02210

21  
22 September 28, 2016  
23 11:30 a.m.

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## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on September 28, 2016.)

JUDGE ZOBEL: Good morning. Please be seated.

COURTROOM DEPUTY CLERK URSO: This is In Re: 13-2419, New England Compounding.

JUDGE ZOBEL: All right. Ms. Johnson, are you it?

MS. JOHNSON: I think I'm it, your Honor. Good morning. Kristen Johnson for the Plaintiffs' Steering Committee.

This morning we have one argument -- one motion that is ready for argument and that is the motion to request approval from the Court to access the PSC's repository by Barry Cadden. I believe Mr. Singal is here to address that motion.

JUDGE ZOBEL: I'm sorry. Who is here on behalf of Mr. Cadden?

MR. SINGAL: Bruce Singal.

JUDGE ZOBEL: How are you?

MR. SINGAL: I'm good, thank you. And thank you for having us.

1 JUDGE ZOBEL: Why don't you find a microphone  
2 somewhere and -- we have a lot of people on the telephone and  
3 they can't hear unless people speak into the microphone.

4 Ms. Johnson, I have read the papers in this case.  
5 Does the PSC or, for that matter, do any of the remaining  
6 defendants in the case have objection to Mr. Cadden's request?

7 MS. JOHNSON: The PSC does, your Honor, and we  
8 filed --

9 JUDGE ZOBEL: Based on the failure or at the moment  
10 not paying for it, or what?

11 MS. JOHNSON: We expressed two concerns. The first  
12 is that the repository was created in order to aid civil  
13 litigation in this case. It was not created for the purpose  
14 of helping the criminal defendants, and we're also mindful of  
15 the government's point of view, which is that Mr. Cadden has  
16 had ample opportunities to conduct discovery through the  
17 criminal process. In our view, reading Mr. Cadden's  
18 submission, he has not made the case for needing access to  
19 that repository.

20 The second point is one of cost, your Honor, which is  
21 it is very expensive to maintain this repository. It's a  
22 repository that's cost has been borne by the Plaintiffs'  
23 Steering Committee, which is supplemented then by some user  
24 fees. The cost, I would say, is really sort of a second issue  
25 here, your Honor. If the Court were to decide that Mr. Cadden

1 should have access, we're confident that we could work out the  
2 user fee or cost issue directly with Mr. Cadden's counsel.

3 JUDGE ZOBEL: Well, if he gets access, I would assume  
4 that there might be also some privacy issues that need to be  
5 addressed, and then I would ask counsel for plaintiff and to  
6 some extent, I guess, the defendants as well, to work out a  
7 protocol, but we're not there yet.

8 MS. JOHNSON: Just to clarify on that point, your  
9 Honor. It should not be the case that there is any protected  
10 health information in that repository. There's a separate  
11 repository to which anything containing HIPAA or otherwise  
12 protected information was --

13 JUDGE ZOBEL: That is already the case?

14 MS. JOHNSON: That is already the case. Now, I'm  
15 saying that. I cannot represent to the Court and I won't  
16 represent to anyone that there's nothing in there that has  
17 slipped through the cracks or that does, in fact, contain  
18 that, but that was the plan from the beginning, your Honor.

19 JUDGE ZOBEL: Okay. I'll hear you.

20 MR. SINGAL: Thank you, your Honor.

21 JUDGE ZOBEL: Why don't you remain seated and then  
22 speak into the microphone. We have yet to get tall enough  
23 microphones.

24 MR. SINGAL: Thank you, your Honor.

25 JUDGE ZOBEL: Especially for you.

1 MR. SINGAL: I feel a little like an interloper here,  
2 your Honor, but thank you for having us.

3 JUDGE ZOBEL: You're welcome.

4 MR. SINGAL: The reason we're here is that we have a  
5 criminal trial scheduled for January 5th, 2016 (sic). There  
6 are some what I would describe as ambiguities, at best, as to  
7 our ability to use some of the information gleaned from this  
8 civil case, and we want to ensure that those ambiguities are  
9 eliminated and that there is no open question. So that when  
10 we go to offer evidence that we have already properly obtained  
11 in the civil deposition or, if given permission, obtained in  
12 the future from the civil depositions and other discovery,  
13 that, frankly, the government not be able to point to this --  
14 to the pending protective order of confidentiality that covers  
15 at least some of those materials. So, the government, your  
16 Honor --

17 THE COURT: Wait a minute. Is access not the issue  
18 at all? Are you simply seeking the use of documents that you  
19 already have?

20 MR. SINGAL: We're seeking permission with respect to  
21 two different categories, your Honor. One is that we have  
22 already properly accessed a large amount of information during  
23 the time we were parties in the civil case, and we want to  
24 ensure that we are able to use that information in the  
25 criminal case.

1           Secondly, once our access was stopped, actually  
2 voluntarily, after Magistrate Judge Boal's order in January,  
3 on a related but different motion, we are asking for  
4 resumption of the access so that we have access to new  
5 information that has been added to the repository since that  
6 time. So, let me address those two categories in turn.

7           The government, essentially, suggests that -- accuses  
8 us of making an end-run around the criminal discovery rules,  
9 and to some degree I would plead guilty to that, unlike my  
10 client who is not guilty of his charges, but I say we plead  
11 guilty to it in the sense that it is the only proper and  
12 sensible way to handle the situation under the circumstances.

13           So, what I mean by that is that as a party in the  
14 civil case, we're permitted access to the repository of  
15 information, not the so-called Rust repository, which has the  
16 protected health information and which we do not seek access  
17 to, but to the remainder of the information that's non-  
18 protected health information.

19           And by way of context -- and I know you have a busy  
20 schedule. I will be brief, but we are defending a 97-count --

21           THE COURT: I always worry when counsel tell me  
22 they're going to be brief.

23           MR. SINGAL: I think I mean it. I'm trying to mean it.

24           But, in any event, to make it short, we have 97  
25 counts against us. One of those is a RICO count with 78



1 racketeering acts. 25 of those racketeering acts are second  
2 degree murder counts, racketeering acts, and the government  
3 has said explicitly how overwhelming their evidence is. They  
4 have said, "We believe" -- and I'm quoting now, "We believe  
5 the evidence leads to the inescapable conclusion that Mr.  
6 Cadden," my client, "and Mr. Chin," who is also going to trial  
7 in January, "will likely face the rest of their lives in  
8 prison."

9 And they have then also gone on to say that -- and  
10 this is from the detention hearing -- that the -- they  
11 describe, "The enormity of offenses these two men are facing  
12 and the sentences that will come when they are convicted."

13 Well, it sounds like the victory lap is about to  
14 begin and we shouldn't even bother showing up, but part of the  
15 reason that we need to be clear on this point is that in light  
16 of what the government characterizes as, "The overwhelming and  
17 draconian evidence," which is virtually certain to result in  
18 our client spending the rest of his life in jail, let's look  
19 at what we're asking for.

20 We're asking just to use -- largely, just to use  
21 material we already have access to, and these are not state  
22 secrets. These are deposition transcripts, for God's sake.  
23 They are discovery in the civil case, and we are simply asking  
24 the Court, out of an abundance of caution, to say under  
25 Paragraph 6 of the protective order that we can use these with

1 the approval of the Court in the criminal case. The provision  
2 in question only applies, I must add, to confidential  
3 discovery material, but because some of the discovery material  
4 that we want to use may well be deemed confidential, we don't  
5 want to have any question about that.

6 So, we are asking the Court to use its authority for  
7 the reason contemplated in this provision, that there be other  
8 purposes allowed, and certainly, given the way the government  
9 has characterized the overwhelming weight of evidence and the  
10 certainty of conviction and sentence, it doesn't seem to be a  
11 lot to ask to be given access to this.

12 Now, the second category is -- when I say, "given  
13 access to it," I mean to use what we already have. The  
14 alternative, I suppose, which is why they call it an end-run,  
15 would be instead of just using what we already have properly  
16 obtained, to re-subpoena it from either the PSC or the parties  
17 who originally provided it and then go through the subpoena  
18 process, which seems ludicrous to me, frankly, and  
19 inefficient, wasteful, and designed, frankly, by the  
20 government's intent just to obstruct our efforts to use  
21 information we are entitled to.

22 Secondly, we are asking that we resume -- be given  
23 renewed access to the materials so that we can access and use  
24 materials that have been added to the repository since the  
25 time we stopped accessing it. We were told our access has

1 been cut off. We haven't checked that because we haven't  
2 tried to get into it because we're trying to ensure that we're  
3 in compliance with the order.

4 And so, we simply want to be able to continue getting  
5 access to the same types of materials we have had access to  
6 properly all along and have the Court rule that we can use  
7 those in the criminal trial, all of which, of course, is going  
8 to end up being subject to Judge Stearns' rulings on  
9 admissibility, but we don't want there to be an artificial  
10 obstacle in the way of that.

11 So, we have proposed an order. I'm sorry that this  
12 was not included as part of our written materials, but we have  
13 proposed an order for your consideration, which captures what  
14 we believe we are entitled to in order to defend ourselves  
15 against these draconian criminal charges.

16 JUDGE ZOBEL: Is the government represented?

17 MR. VARGHESE: Yes, your Honor.

18 JUDGE ZOBEL: You are?

19 MR. VARGHESE: George Varghese for the United States.

20 JUDGE ZOBEL: George?

21 MR. VARGHESE: Varghese for the United States, your  
22 Honor.

23 JUDGE ZOBEL: Why does the government object?

24 MR. VARGHESE: Your Honor, the government doesn't  
25 object to Mr. Cadden having access to documents. The point

1 is, your Honor, that there's the Rules of Federal Criminal  
2 Procedure. He can have any documents he wants. He just has  
3 to use the Criminal Procedure Rules that are in place to get it.

4 THE COURT: Why?

5 MR. VARGHESE: The reason why we --

6 JUDGE ZOBEL: If he already has them, why does he  
7 have to go through the process --

8 MR. VARGHESE: Well, your Honor, there's two things  
9 on that point, your Honor. First, with respect to what he has  
10 and what he doesn't have, Magistrate Judge Boal specifically  
11 ruled in January of 2016 that he wasn't entitled to continue  
12 to attend depositions because he was a settling defendant. He  
13 was sitting in --

14 JUDGE ZOBEL: That's a different issue.

15 MR. VARGHESE: No. He wants to get the deposition  
16 transcript that he was not allowed to sit in on. And so, we  
17 don't understand why, when the Court issues an order saying  
18 you're not entitled to attend these depositions and now he's  
19 coming back to this Court and saying, Well, we want to have  
20 access to them, even though you previously told us we couldn't  
21 sit in on them.

22 JUDGE ZOBEL: What's the difference between  
23 participating in a process and then getting the fruits of that  
24 process?

25 MR. VARGHESE: Your Honor, with all due respect,

1       though --

2               JUDGE ZOBEL:   I think --

3               MR. VARGHESE:   With all due respect, your Honor, he's  
4       trying to get something which the Court has already said  
5       previously that he shouldn't have been able to sit in on and  
6       he filed an emergency motion and it was denied.

7               JUDGE ZOBEL:   Okay.

8               MR. VARGHESE:   And so, your Honor, if the Court wants  
9       to go down this route and give him access to all of it, what  
10      the government is asking for is that the government also have  
11      access to it as well as the eleven other criminal defendants.

12              JUDGE ZOBEL:   Why?

13              MR. VARGHESE:   Because, your Honor, we don't think  
14      it's fair to give one person access and not the rest of the  
15      parties in the criminal matter.  There's a criminal discovery  
16      process in place, your Honor.  There's discovery that's been  
17      provided to the defendant, more than 12 million pages.  We  
18      don't understand why defendant Cadden gets to access all of  
19      these depositions that are primarily -- that were solely for  
20      the litigation in this MDL and the bankruptcy proceeding.  Why  
21      does he get to look at all of these depositions and the  
22      government and the other eleven defendants not?

23              So, the rule either has to be that nobody should be  
24      able to use that or if they are going to be able to use it,  
25      that everybody be allowed to use in interest of fairness, your

1 Honor. We don't think he should be allowed to use it, because  
2 people contributed to this repository, your Honor, for the  
3 MDL. All of these parties, all of these third-party vendors,  
4 all of these settling parties contributed because --

5 JUDGE ZOBEL: He contributed, too.

6 MR. VARGHESE: He didn't.

7 JUDGE ZOBEL: Because of the criminal case?

8 MR. SOBOL: I don't want to interrupt any of them,  
9 but I do want to be heard on this at some point.

10 MR. SINGAL: I'm not sure I can point to discovery we  
11 contributed. What we merely contributed, your Honor, was \$22  
12 million towards the civil settlement.

13 MR. VARGHESE: That's a separate process, your Honor.

14 JUDGE ZOBEL: Yes, that is separate.

15 MR. SINGAL: And I will say that -- I'm sure Mr.  
16 Varghese has read our reply where we made it clear that if the  
17 Court deems it appropriate, we have no objection to the  
18 government and the other defendants having access to this  
19 information.

20 MR. VARGHESE: But the point is, your Honor, they  
21 didn't contribute anything. They never -- they sat in on  
22 depositions for the sole purpose of trying to glean  
23 information for the criminal case. This whole process that  
24 defendant Cadden has been undertaking with respect to this MDL  
25 discovery process has been to prepare for the criminal case,

1 your Honor, and we object to that. There is a criminal  
2 procedure in place. That's the way the system is supposed to  
3 work and we don't think that this is an appropriate way of  
4 doing it, but if the Court wants to entertain it, we would  
5 say, fine, then open it up to everybody, but, again, then  
6 we're talking about cost issues and the PSC has objections to  
7 that.

8 But let's be clear about it, your Honor. They did  
9 not contribute anything to this repository. They didn't ask  
10 any deposition questions. They just sat in and listened and  
11 gleaned from these transcripts what they could to help them in  
12 the criminal case. This whole -- this whole participation in  
13 the MDL discovery process has been about the criminal case.

14 JUDGE ZOBEL: Well, I can understand that if you're  
15 charged with 98 different counts.

16 MR. VARGHESE: We have also provided discovery as  
17 we're entitled -- as we're obligated to under the rules, and  
18 he is obligated to follow the rules as well. If he wants  
19 documents, he can file a Rule 17 subpoena, like every other  
20 criminal defendant.

21 MR. SOBOL: If I may, your Honor?

22 JUDGE ZOBEL: Mr. Sobol.

23 MR. SOBOL: I think it's important to understand that  
24 from the PSC's perspective, the question is where should this  
25 decision be made, here or in front of Judge Stearns. We think

1 it should be done in front of Judge Stearns, with all respect,  
2 and here's the reason why.

3 When this outbreak occurred in the fall of 2012, the  
4 CDC determined that there were many people who had been killed  
5 or injured by reason of what it is that came out of NECC.  
6 This MDL was a result of trying to determine the civil  
7 liability and compensation for victims, and that process ought  
8 not turn out to be a vehicle for Mr. Cadden to defend his  
9 murder charges.

10 So, at the very outset, when this MDL got formed, the  
11 PSC wanted to take discovery of Mr. Cadden and Mr. Chin and  
12 Mr. Doug Conigliaro and all the rest of them of the Insiders.  
13 We wanted to be able to take depositions of them. We wanted  
14 to have them contribute their personal documents, and if they  
15 wanted to take the Fifth, we wanted them in front of a camera  
16 taking the Fifth so we could use that in the civil proceeding  
17 later.

18 They adamantly opposed that for the two years that it  
19 took us to negotiate a settlement. They didn't want to  
20 contribute any documents. They wouldn't sit in front of a  
21 camera and take the Fifth. They wouldn't answer any  
22 questions. They didn't put anything in the repository.

23 Their position was we're going to settle in the  
24 bankruptcy. We're going to contribute some money. We're not  
25 going to do anything else for you. If you try to come after



1 us for it, you shouldn't be doing that, and so we didn't.

2 Now, I was perplexed why it is during that whole time  
3 that Mr. Cadden was, in fact, participating, but taking --  
4 getting access to the information that was being provided into  
5 the repository, because his position was he shouldn't be a  
6 part of any discovery. We're negotiating a deal. So, if  
7 we're negotiating a deal, why are you participating? I always  
8 sensed that it was probably to defend some eventual criminal  
9 charges.

10 He was shut down appropriately by Judge Boal earlier  
11 this year from participating in those depositions because then  
12 we knew at that point that he had settled, that what he was  
13 doing was sitting around trying to use this process, taint  
14 this MDL, as a vehicle for him to defend his murder charges,  
15 and that wasn't right, and we don't think it should be done  
16 now.

17 Now, if there's a subpoena served on us by Judge  
18 Stearns, we'll respond to it in kind, and he can sit on it and  
19 make a decision at that point in that vehicle as to whether or  
20 not fruits that were -- of this proceeding should be used for  
21 that criminal process, but I don't think it's appropriate,  
22 with all due respect -- I mean that in no hidden way -- for  
23 this Court to have to make a decision about whether or not  
24 this -- these proceedings should be used one way or another  
25 for Mr. Cadden to defend his RICO murder charges.

1 MR. SINGAL: Your Honor, I -- just very briefly.

2 Mr. Sobol filed a one-page opposition that was  
3 confined to cost issues, which are easily resolvable. There  
4 were very little cost issues because, again, the bulk of what  
5 we are asking to use we already have, and I understand the  
6 faced with what the government says will put our client in  
7 jail for life, we've had the temerity to exercise  
8 constitutional rights and we have had the temerity to look to  
9 see whether civil depositions and other discovery might  
10 provide some exculpatory information to defend against the  
11 overcharges we're confronted with.

12 And so, to sit and listen to this notion that we are  
13 undermining the criminal justice system in some way when we  
14 are simply trying to use information we properly obtained as  
15 parties in this case and that we are entitled to properly use  
16 and continue to gain access to just really is a disconnect  
17 between the seriousness of the criminal charges and, frankly,  
18 the triviality of the objections.

19 JUDGE ZOBEL: We will take the papers. We have not  
20 decided as between us who will decide. One of us will. Thank  
21 you all very much.

22 MR. VARGHESE: Thank you, your Honor.

23 MR. SINGAL: Thank you.

24 JUDGE ZOBEL: Ms. Johnson, I think you have the floor  
25 again.

1 MS. JOHNSON: Thank you, your Honor.

2 That brings us to Item B on the agenda, report to the  
3 Court. Up first on the status of the bankruptcy, we have an  
4 update on the payments from the trust fund.

5 JUDGE ZOBEL: I saw your motion, your note. I guess  
6 that's a report.

7 MS. JOHNSON: Yes.

8 JUDGE ZOBEL: That's good work. Is the government  
9 represented on the telephone today?

10 (No response.)

11 JUDGE ZOBEL: No.

12 MS. JOHNSON: I do not believe so, your Honor.

13 JUDGE ZOBEL: Do we need them?

14 MS. JOHNSON: I don't think so, no. Things are  
15 coming along just fine.

16 JUDGE ZOBEL: Good.

17 MS. JOHNSON: There have been a total of about 2,339  
18 claims filed by victims. As of this week --

19 JUDGE ZOBEL: Against Medicare?

20 MS. JOHNSON: No, your Honor. I'm sorry. I'm  
21 speaking of claims generally filed in the bankruptcy on behalf  
22 of the tort victims.

23 JUDGE ZOBEL: These are people who want to get into  
24 the trust?

25 MS. JOHNSON: Correct. These are people that very

1 much want their checks, understandably.

2           So far -- I'm sorry. In total, there have been about  
3 2,339 claims filed by tort victims. As of this week, about 90  
4 percent of those claims have been finally adjudicated by the  
5 claims administrator. Meaning, they're done. That number is  
6 comprised of about 85 percent that were allowed, in whole or  
7 in part, and to which there's been no objection, and five  
8 percent where there were denials issued and there's been no  
9 appeal. About ten percent of those claims remain pending.  
10 That includes about seven percent --

11           JUDGE ZOBEL: Ten percent of the denials or ten  
12 percent of the total?

13           MS. JOHNSON: Ten percent of the total, your Honor,  
14 remain pending. That includes about seven percent that  
15 receives an initial determination, but which is still under  
16 review by the claims administrator, often at the victim's  
17 request that it still be under review, and then about three  
18 percent are claims that were denied, in whole or in part, and  
19 are on appeal.

20           Speaking with Mr. Ellis this morning, I understand  
21 that the universe of the appeal is about 68 individual claims,  
22 and I understand that that is a sufficient amount for Judge  
23 Nieman, who is the appeals administrator, to process and  
24 continue working through. So, it is believed that there will  
25 be no problems with that appellate process in dealing with

1 those appeals in a timely manner.

2 As to the approved claims, the tort trustee is  
3 continuing to receive information from Medicare and state  
4 Medicaid agencies on behalf of the victims. As she receives  
5 that information, she then issues lien letters to the victims  
6 or the victim's attorney, depending on whether they're pro se.  
7 Those letters then require a response from the attorney of the  
8 victim, and once that response is received, then checks can be  
9 sent out.

10 JUDGE ZOBEL: In the full amount of the claim or  
11 partial?

12 MS. JOHNSON: These are initial payments only, your  
13 Honor, that we're talking about. We do expect there to be  
14 later payments down the road, in part, because of the tax  
15 refunds, some of which have made their way into the tort  
16 trust, but some of which we expect well in the future.

17 The first checks to victims went out in August.  
18 Further checks continue to be issued on a weekly basis, and it  
19 is our --

20 JUDGE ZOBEL: You beat your initial aim by at least  
21 three months, haven't you, maybe four? Initially it wasn't  
22 anticipated until -- the checks would go out in the December.  
23 Wasn't that right?

24 MS. JOHNSON: I think at some point, your Honor, yes,  
25 that was our projection. I think more recently we had

1 targeted August for the first payments to go out. We now  
2 expect, given the way that the process has played out, that  
3 all or virtually all claimants will receive checks by  
4 year-end, and we continue to do everything that we can to  
5 expedite that process. And when I say "we," I should be  
6 clear. In large part, it's the tort trustee who is charged  
7 with all of this. The PSC and others, including Mr. Ellis,  
8 have helped to facilitate that process.

9 So, unless there are any questions, your Honor, about  
10 status of the payments, we can move on.

11 JUDGE ZOBEL: Thank you.

12 MS. JOHNSON: That brings us to Item 2, the status of  
13 the insurance declaratory judgment actions, which Mr. Stranch  
14 will discuss.

15 MR. STRANCH: Good morning, your Honor.

16 Just this week we received notice that the Supreme  
17 Court denied the request to take the certified question. So,  
18 it is not being taken by the Tennessee Supreme Court.

19 JUDGE ZOBEL: So, what does that mean? Where does it  
20 go from here?

21 MR. STRANCH: That means we return back to the  
22 District Court and the litigation will commence from there.

23 JUDGE ZOBEL: Here?

24 MR. STRANCH: No. In the District Court in Tennessee  
25 where it's pending.

1 JUDGE ZOBEL: Okay.

2 MS. JOHNSON: Item 4, status of the litigation track.  
3 4(a) is the suggestion of remand. To inform the Court and  
4 those listening by phone, the JPML has entered the Court's  
5 suggestion of remand and 66 cases have now been remanded or in  
6 the process of being remanded to their original transfer or  
7 districts.

8 4(b) addresses Specialty Surgery Center matters and,  
9 again, Mr. Stranch will address that.

10 MR. STRANCH: I'm not going to say a "brief"  
11 background because I know you hate the word "brief." So, I'll  
12 take my time and explain it.

13 (Laughter.)

14 THE COURT: "Brief" has many meanings.

15 MR. STRANCH: Yes. If the Court recalls, we had some  
16 motion practice against a third party for computers that had  
17 been transferred from the defendant to a third party. The  
18 litigation over whether that was to be produced and what was  
19 to be produced from it has now been resolved, but we're in the  
20 production process and it's taking longer than what the  
21 parties anticipated.

22 And so, there's competing motions. There's motions  
23 that have been filed to modify portions of the schedule, but  
24 the problem is, just from a practical point, the amount of  
25 time that it's going to take for third parties to get all the

1 documents reviewed and produced to the defendants so the  
2 defendant can then do the privilege review that they've  
3 allowed to do and produce it to us is going to mean that we're  
4 going to blow other deadlines in the case and they won't be  
5 able to be met.

6 So, what we would propose to the Court, because  
7 there's multiple motions pending on this and some of the stuff  
8 has changed since the initial motions were filed, is that we  
9 get together with the defendants and work out exactly what  
10 they need, which we think we know now, and how that impacts  
11 the rest of the schedule.

12 For example, our deposition cut-offs will be before  
13 we receive the documents, just as an example. So, we're going  
14 to need to move certain dates around to accomplish that, and I  
15 will represent to the Court that it's the PSC's intention to  
16 keep those dates as tight as possible, but also not to make it  
17 impossible for the defendants to be able to get the documents  
18 to us. That's how I propose resolving this if that works for  
19 the Court.

20 JUDGE BOAL: Sounds sensible. When do you think  
21 you'll submit the new proposal?

22 MR. STRANCH: Say, ten days?

23 MR. TARDIO: Your Honor, Chris Tardio for the  
24 Specialty Surgery Center defendants.

25 Yes, I think we can submit a proposed schedule and I



1 hope that it will be agreed upon. I don't know whether Mr.  
2 Stranch anticipates or that the Court will rule on Cumberland  
3 Medical Center's motion for more time to review the documents,  
4 because if the Court grants Cumberland Medical Center's motion  
5 through, I believe, October 10th to review the documents, that  
6 will allow us to go from October 10th forward with the rest of  
7 the deadlines. If the Court were going to deny it, then that  
8 would impact what we agreed upon.

9 MR. STRANCH: Your Honor, to be perfectly frank, I'm  
10 working under the assumption that it's going to be granted  
11 because they simply can't do it before then.

12 MR. TARDIO: I agree.

13 JUDGE BOAL: Assuming this was before me, I was  
14 intending to grant it and then work with you all, and I have  
15 read your response.

16 MR. WEHMEIER: Your Honor?

17 JUDGE BOAL: Yes.

18 MR. WEHMEIER: Paul Wehmeier for Cumberland Medical  
19 -- representing Cumberland Medical Center.

20 JUDGE ZOBEL: You're on.

21 (Pause.)

22 JUDGE ZOBEL: Are you there?

23 MR. WEHMEIER: Yes. I'm sorry. I'm having a very  
24 difficult time hearing you.

25 I just wanted to make clear that we are on the line,

1 happy to answer questions. The deadline was premised upon the  
2 ediscovery review that we had undertaken. Since the filing of  
3 our motion, your Honor, there has been also some documents  
4 identified as part of the forensic review which are relatively  
5 sizable as far as number of emails.

6 For example, there's a PDF file, your Honor, that has  
7 been identified for further review that has just in two sub-  
8 folders of the email file over a thousand messages and, as I  
9 understand it, those messages may or may not have come up in  
10 the ediscovery review. So, there are additional documents  
11 that we are still trying to work with the PSC on and Logic  
12 Force, the third-party provider, that we haven't really even  
13 considered with respect to our October 10 deadline.

14 We're certainly happy on the ediscovery side to get  
15 that additional time and we believe we can complete our review  
16 of the ediscovery documents within that time, but we're still  
17 a little bit without information with respect to this forensic  
18 review portion.

19 JUDGE BOAL: So, why don't I -- in the first  
20 instance, I grant Cumberland's motion at Docket 3097, and then  
21 I suppose I could grant the motion at Docket 3096, but not set  
22 specific dates and wait to get a proposal from you all as well  
23 as Cumberland's attorney, and understanding that you're going  
24 to submit it in ten days' time.

25 MR. STRANCH: That works for us, your Honor.

1 MR. TARDIO: Thank you, your Honor.

2 MS. JOHNSON: That brings us to Item 4(c), addressing  
3 the Box Hill cases, and I believe Ms. Sharon Houston and Patty  
4 Kasputys are on the phone to address those for the plaintiffs.

5 MS. HOUSTON: Good morning, your Honor.

6 JUDGE ZOBEL: Good morning.

7 MS. HOUSTON: This is Sharon Houston. All three  
8 issues have been resolved. One, the notice by the  
9 consolidated plaintiffs for the request of extension of time  
10 was granted.

11 (Pause.)

12 JUDGE ZOBEL: Are you there?

13 MS. HOUSTON: And the motion for remand or transfer  
14 the Box Hill cases to Maryland was denied, and the notice for  
15 the consolidated plaintiffs for common issue expert report was  
16 -- those reports were served on 9/15, and in line with the  
17 amended discovery deadline, the defendants' common issue  
18 expert reports will be due October 17th.

19 JUDGE ZOBEL: So, that's all on Box Hill, right?

20 MS. HOUSTON: That's correct.

21 JUDGE ZOBEL: And it is progressing neatly?

22 (No response.)

23 JUDGE ZOBEL: Thank you.

24 MS. HOUSTON: I'm sorry, I didn't hear you.

25 JUDGE ZOBEL: It's okay.

1 MS. JOHNSON: That brings us, then, your Honor, to  
2 4(d), the status of cases not objecting to remand. Many of  
3 those were resolved by the JPML remanding cases. So, I'm not  
4 sure there's anything else to address there.

5 JUDGE ZOBEL: What about the California case, Roman  
6 IV? It says it's in arbitration, binding arbitration.

7 MS. JOHNSON: Yes. So, I believe that case, your  
8 Honor -- I understand it's listed under cases not objecting to  
9 remand. That's actually part of a group of cases where  
10 objections to remand were filed.

11 JUDGE ZOBEL: The status --

12 MS. JOHNSON: Well, I'm not sure, but those cases are  
13 all represented by Ms. Dougherty, and Justin Browne from her  
14 firm, I believe, is on the phone to address those cases. So,  
15 he may be able to answer your question.

16 MR. BROWNE: This is Justin Browne. I am on the  
17 phone and I would be happy to answer any questions. However,  
18 I did not hear the question.

19 JUDGE ZOBEL: The question was what the status is of  
20 the California case. I gather, there's only one California  
21 case which is in the process of binding arbitration.

22 MR. BROWNE: Okay. The California case, which is --  
23 the plaintiff's last name is Jeffries. In that case, your  
24 Honor, after a long period of time of being unable to reach  
25 our client and otherwise resolve the matter, we have done so

1 and we believe we will have a final resolution within the next  
2 30 days, if not sooner.

3 I spoke with defense counsel via email as recently as  
4 yesterday. He's graciously agreed to give us that time to  
5 wrap things up, with the Court's indulgence, of course, and  
6 with the understanding that defendant is retaining its right  
7 to be heard on the matter if something falls through, but we  
8 anticipate being able to wrap that up very quickly, your  
9 Honor.

10 JUDGE ZOBEL: Well, that's good.

11 Are there any -- is it necessary for us, the Court,  
12 to make any decision as to any of these cases or is there  
13 agreement as to all, all of the remands that are listed here?

14 MR. BROWNE: Your Honor, if I may. We have three  
15 categories of cases that I'm prepared to discuss with you  
16 today, one of which you have already resolved. So, that will  
17 leave two.

18 In the first group of cases -- there are five of  
19 them -- we will be filing dismissals. We worked out the  
20 language with defense counsel and I think there's just a  
21 couple of things to -- some t's to cross and i's to dot, but  
22 we will be filing dismissals in the following cases: Last  
23 name Montee, M-o-n-t-e-e, and I'll give you case numbers, if  
24 you would like, your Honor. Just let me know. I'm going to  
25 be mindful of everyone's time. Would you want that?

1 JUDGE ZOBEL: Montee, and there were several cases  
2 that -- I can't find them. They were listed somewhere in this  
3 document. I can't find it anymore. So, Montee, I remember  
4 they were Massachusetts cases, I thought, were they not?

5 MS. JOHNSON: There are some direct-filed cases, your  
6 Honor, in Massachusetts. That's a separate category from what  
7 I believe Mr. Browne is addressing.

8 JUDGE ZOBEL: Is Montee one of them?

9 MS. JOHNSON: Let me check, your Honor.

10 (Pause.)

11 MS. JOHNSON: No, your Honor. The list of directly-  
12 filed cases in Massachusetts, just for the Court's reference,  
13 is an ECF No. 3065.

14 JUDGE BOAL: Can I ask about those cases? My  
15 understanding is discovery was stayed in those cases, perhaps  
16 until today. So, what should we be entering a schedule for  
17 those cases at this point?

18 MS. JOHNSON: I believe what we discussed last time  
19 -- at the last status conference, your Honor, is that we would  
20 stay discovery until today, at which point we hope to  
21 understand what was going on in the cases to which objections  
22 to remand have been filed, and my understanding is Mr. Browne  
23 has just updated the Court verbally about what's going on in  
24 those cases.

25 I might suggest that he file a short status report

1 with the Court that has the docket numbers and the plaintiffs'  
2 names. So that there may be easier.

3 JUDGE ZOBEL: I accept Ms. Johnson's suggestion. We  
4 both do.

5 MS. JOHNSON: Thank you, your Honor.

6 JUDGE ZOBEL: That doesn't mean, Mr. Browne, you need  
7 to stop talking.

8 MS. JOHNSON: Right. And, Mr. Browne, I don't mean  
9 to speaking over you, but to address the directly-fileds.

10 My suggestion would be, once we understand what's  
11 going on with the objections to remand, it may make sense to  
12 impose either the same or staggered schedules, but it may be  
13 helpful to -- as we're plotting the course for trials forward,  
14 it may be helpful to understand what other cases, if any,  
15 would be staying here and worked up.

16 So, my short-term suggestion, your Honors, would be  
17 that we extend that stay of discovery until the next status  
18 conference, and before the next status conference the  
19 plaintiffs in all of these cases, including the directly-filed  
20 and those to which there remain objections to remand for  
21 propose of the schedule or schedules, preferably in  
22 conjunction with the defendants, that they think makes sense  
23 for getting these cases to trial.

24 JUDGE ZOBEL: Did you hear that, Mr. Browne?

25 MR. BROWNE: Yes. And I'm happy to do that, your

1 Honor.

2 JUDGE ZOBEL: Well, that would be good, but we're  
3 perfectly happy to hear you with any further discussion,  
4 further report. Is that it?

5 (No response.)

6 JUDGE ZOBEL: I guess it is. So, that takes care of  
7 Part E.

8 MS. JOHNSON: Yes, it does, your Honor.

9 So, that brings us to five, the Saint Thomas cases,  
10 which Mr. Stranch will address.

11 JUDGE ZOBEL: Well, there's one motion which is  
12 assented to and allowed, Docket No. 3085.

13 MR. STRANCH: Good. And I have the privilege of  
14 letting the Court know that we have finally finished papering  
15 the settlement and the parties have signed and we are now  
16 working through the terms of the settlement and doing what  
17 we're required to do.

18 JUDGE ZOBEL: Thank you. Pro se.

19 MS. MARTIN: Yes, your Honor. Since the last report,  
20 we've had a handful of phone calls, perhaps four, just some  
21 questions on forms and one question on a lien letter, which we  
22 have handled and answered any questions that they've had and  
23 sent them on their way. So, that's the report, four calls.

24 JUDGE ZOBEL: Thank you.

25 MS. JOHNSON: That brings us to C(1), which the Court



1 has already addressed. C(2) The Court has also already heard  
2 argument on this morning, which brings us to (3), the  
3 petitions for final approval of settlement distributions from  
4 two of the Virginia wrongful death cases.

5 JUDGE ZOBEL: I have those and I will be happy to  
6 sign them. They're here somewhere.

7 MS. JOHNSON: With the understanding, as your Honor  
8 just said, that you'll be signing those, I don't know whether  
9 counsel on the telephone, either Mr. Busch or Mr. Fennell,  
10 wanted to be heard.

11 JUDGE ZOBEL: I have two final orders approving  
12 wrongful death distributions. That's what you're talking  
13 about, right?

14 MS. JOHNSON: Yes, your Honor. It would be Docket  
15 No. 3094.

16 JUDGE ZOBEL: And 3095.

17 MS. JOHNSON: And 3095, yes. Thank you, your Honor.

18 JUDGE ZOBEL: Thank you.

19 MS. JOHNSON: That brings us, then, to D, briefing in  
20 progress, and one topic to just bring the Court's attention to  
21 is that the -- D(2) is the Plaintiffs' Steering Committee's  
22 motion for distribution of common benefit fees and expenses.

23 The PSC has filed that motion making a recommendation  
24 to the Court. The briefing schedule has already been set,  
25 such that objections, if any, are due October 24th and the

1 PSC's reply, if any, is due November 21st, which means that  
2 the motion as -- under the current schedule will not be ready  
3 for decision until late November or December.

4 Other than that, we have Item E, motions stayed  
5 temporarily. Those all relate to the Saint Thomas settlement.  
6 I think there's nothing to address there, thankfully.

7 JUDGE ZOBEL: The long list of these cases makes me  
8 think that the order was a confidential order.

9 (Laughter.)

10 MS. JOHNSON: Agreed, your Honor.

11 And then that brings us to F, future status  
12 conferences. And we had a November 3rd date set, but I  
13 understand that's the same day that Congress is hearing  
14 testimony about proposed changes to the Federal Rules and that  
15 multiple attorneys, at least on the plaintiffs' side, may be  
16 participating in that hearing now. So, we wondered if the  
17 Court could possibly move the hearing to either November 1st  
18 or 2nd instead of the 3rd.

19 COURTROOM DEPUTY CLERK URSO: Yes, Judge. The 2nd is  
20 -- let me just see. I think it's the other MDL case we have.  
21 We have the other MDL case, Judge, on that day. We have  
22 Prograf on that day, Judge, at 2:00.

23 (Discussion off the record at the Bench.)

24 UNIDENTIFIED SPEAKER: Hello.

25 JUDGE ZOBEL: Hello. We are checking our calendars

1 to find out whether we can accommodate counsel on either  
2 November 1st or 2nd instead of 3rd.

3 COURTROOM DEPUTY CLERK URSO: Judge, you have an  
4 11:00, 11:15 and 11:30 on that day, criminal.

5 JUDGE ZOBEL: On the 1st?

6 COURTROOM DEPUTY CLERK URSO: On the 1st. Judge Boal  
7 has two statuses and a telephone conference starting at 11:00.

8 JUDGE BOAL: We can move that.

9 COURTROOM DEPUTY CLERK URSO: Okay.

10 JUDGE ZOBEL: So, November 1st in the morning,  
11 because the first Tuesday of the month -- is it Tuesday?

12 COURTROOM DEPUTY CLERK URSO: Yes.

13 JUDGE ZOBEL: -- is the Court meeting in the  
14 afternoon.

15 COURTROOM DEPUTY CLERK URSO: So, what time would --  
16 what time would counsel be --

17 MS. JOHNSON: Plaintiffs can make any time work. I  
18 think we've traditionally done 11:30, but whatever works for  
19 the Court.

20 JUDGE ZOBEL: Well, it depends. Some people have to  
21 travel.

22 MR. KIRBY: That's fine with Box Hill.

23 COURTROOM DEPUTY CLERK URSO: Do you want to do --

24 MS. GREER: Your Honor?

25 JUDGE ZOBEL: Yes.

1 MS. GREER: I don't know if we're going to be here at  
2 that point and I don't have -- Marcy Greer for the Saint  
3 Thomas Entities. But the night before is Halloween and I have  
4 a nine-year-old and if there's any way we can do it in the  
5 afternoon, I'd be happy to fly up on the first flight that  
6 morning.

7 JUDGE ZOBEL: We can't do it in the afternoon. What  
8 time do you get in?

9 MS. PUIG: Or would the Court consider the 2nd of  
10 November? Yvonne Puig.

11 MS. GREER: Yvonne Puig, my colleague, is asking if  
12 we could do it on the 2nd.

13 JUDGE ZOBEL: Well, the 2nd we have already another  
14 MDL settlement hearing, which may or may not be major. I  
15 don't know.

16 MR. STRANCH: Your Honor, Gerard Stranch. I'm  
17 actually one of the lawyers in the Prograf case, and we have  
18 no objections to the settlement. And so --

19 JUDGE ZOBEL: Does anybody have any objection?

20 MR. STRANCH: No, your Honor.

21 JUDGE ZOBEL: What time is that scheduled?

22 MR. STRANCH: 2 o'clock.

23 DEPUTY COURTROOM CLERK URSO: 2 o'clock.

24 JUDGE ZOBEL: So, we could do this at 2:30?

25 MR. STRANCH: I assume so.

1 COURTROOM DEPUTY CLERK URSO: Hold on.

2 JUDGE ZOBEL: This would be on the 1st -- no. The 2nd.

3 MR. KIRBY: Your Honor, not to throw a cog in the --  
4 Greg Kirby for the Box Hill defendants.

5 I just have something mandatory that I have to go to  
6 at the end of the day on the 2nd. It's already on my  
7 calendar. So, depending on what it is, I could do it, but if  
8 it's too late in the day, I can't do it.

9 JUDGE ZOBEL: How about the morning of the 2nd, can  
10 you do it then?

11 MR. KIRBY: Yes, I could.

12 COURTROOM DEPUTY CLERK URSO: We don't have anything  
13 in the morning.

14 JUDGE ZOBEL: How about Judge Boal?

15 COURTROOM DEPUTY CLERK URSO: She has a -- Judge, you  
16 have a few conferences and motion hearings starting at 11:00,  
17 three conferences and then a motion hearing at 11:30, and then  
18 a status and a Rule 11 at 2:00 on that day. So, we could do  
19 the morning.

20 JUDGE ZOBEL: We'll do it on the morning of November  
21 2nd. How about 10 o'clock? Is that time enough to get the  
22 early flight?

23 MR. KIRBY: Yes, your Honor.

24 JUDGE ZOBEL: So, 10 o'clock on the 2nd.

25 COURTROOM DEPUTY CLERK URSO: Okay.

1 JUDGE ZOBEL: And we will stick with December 8th at  
2 the usual time, 2 o'clock, right?

3 MR. KIRBY: As for December 8th, is there any way to  
4 do that in the morning?

5 JUDGE ZOBEL: I don't know.

6 COURTROOM DEPUTY CLERK URSO: We have -- Brigham &  
7 Women's is coming in on the 5th for a trial.

8 JUDGE ZOBEL: We're on trial?

9 COURTROOM DEPUTY CLERK URSO: We're on trial that  
10 week. So, we could only do it in the afternoon on the 8th.

11 MR. KIRBY: Any chance you could change it to the 6th?

12 JUDGE ZOBEL: To when?

13 MR. KIRBY: December the 6th.

14 COURTROOM DEPUTY CLERK URSO: No. We're on trial  
15 that week.

16 MR. KIRBY: I'm sorry.

17 JUDGE ZOBEL: We start that Monday. It's a patent  
18 case, isn't it?

19 COURTROOM DEPUTY CLERK URSO: Yes, Judge. So, I  
20 think it's going to go. So, we have trial from 9:00 to 1:00  
21 that week.

22 MR. KIRBY: Every day that week?

23 JUDGE ZOBEL: We sit every day.

24 COURTROOM DEPUTY CLERK URSO: Yes, we do.

25 MR. KIRBY: Is there an objection to doing it on the

1 9th in the afternoon?

2 MS. JOHNSON: That's fine with the plaintiffs, your  
3 Honor.

4 (Discussion off the record at the Bench.)

5 JUDGE ZOBEL: That won't work for us. The 9th  
6 doesn't work for us.

7 MR. KIRBY: Okay. Well, we'll just keep it where it  
8 is on the 8th. I'll see what I can do.

9 JUDGE ZOBEL: On the 8th, at 2:00.

10 COURTROOM DEPUTY CLERK URSO: Yes, Judge.

11 JUDGE ZOBEL: That's the most complicated part of the  
12 hearing.

13 MS. JOHNSON: Usually, your Honor, I would suggest we  
14 pick a date in January, but maybe we can wait on that.

15 JUDGE ZOBEL: And go through this the next time  
16 around?

17 MS. JOHNSON: At the Court's preference.

18 JUDGE ZOBEL: All right. So, then everybody agrees  
19 that we live with only two future meetings for the moment.  
20 Thank you all very much -- wait a minute.

21 Is there anything else we need to do? Does anybody  
22 have any other issues, telephone, or otherwise?

23 (No response.)

24 JUDGE ZOBEL: Thank you. The meeting is adjourned.

25 MR. STRANCH: Thank you, your Honor.

1 MS. JOHNSON: Thank you, your Honor.

2 (Adjourned, 12:19 p.m.)

3  
4  
5 C E R T I F I C A T E

6 I, Catherine A. Handel, Official Court Reporter of the  
7 United States District Court, do hereby certify that the  
8 foregoing transcript, from Page 1 to Page 40, constitutes to the  
9 best of my skill and ability a true and accurate transcription of  
10 my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In  
11 Re: New England Compounding Pharmacy, Inc., Products Liability  
12 Litigation.

13  
14 October 28, 2016  
Date

/s/Catherine A. Handel  
Catherine A. Handel RPR-CM, CRR

15  
16  
17  
18 C E R T I F I C A T E

19 I, Catherine A. Handel, Official Court Reporter of the  
20 United States District Court, do hereby certify that the  
21 foregoing transcript, from Page 1 to Page 39, constitutes to the  
22 best of my skill and ability a true and accurate transcription of  
my stenotype notes taken in the matter of Multidistrict  
Litigation No. 13-02419-RWZ, In Re: New England Compounding  
Pharmacy Cases Litigation.

23  
24 October 6, 2016  
Date

/s/Catherine A. Handel  
Catherine A. Handel, RPR-CM, CRR

25